

1 **BRAD D. BRIAN (CA Bar No. 079001, *pro hac vice*)**

Brad.Brian@mto.com

2 **LUIS LI (CA Bar No. 156081, *pro hac vice*)**

Luis.Li@mto.com

3 **TRUC T. DO (CA Bar No. 191845, *pro hac vice*)**

Truc.Do@mto.com

4 **MIRIAM L. SEIFTER (CA Bar No. 269589, *pro hac vice*)**

Miriam.Seifter@mto.com

5 **MUNGER, TOLLES & OLSON LLP**

355 South Grand Avenue, Thirty-Fifth Floor

6 Los Angeles, CA 90071-1560

Telephone: (213) 683-9100

7 **THOMAS K. KELLY (AZ Bar No. 012025)**

8 tskelly@kellydefense.com

425 E. Gurley

9 Prescott, Arizona 86301

Telephone: (928) 445-5484

10 Attorneys for Defendant JAMES ARTHUR RAY

11
12 **SUPERIOR COURT OF STATE OF ARIZONA**
13 **COUNTY OF YAVAPAI**

14 **STATE OF ARIZONA,**

15 Plaintiff,

16 vs.

16 **JAMES ARTHUR RAY,**

17 Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
REPLY IN SUPPORT OF MOTION TO
INTRODUCE IMPEACHMENT
EVIDENCE OF CONVICTION OF
CRIMES PURSUANT TO ARIZ. R. OF
EVID. 609, RE: RICK ROSS AND FAWN
FOSTER**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The prosecution will call in its case-in-chief two witnesses with extensive criminal
4 histories. The Confrontation Clause and Arizona Rule of Evidence 609 entitle the Defense to a
5 full and fair cross-examination of these witnesses, including the ability to “attac[k] the
6 credibility” of the witnesses with “evidence that the witness has been convicted of a crime.”
7 Ariz. R. Evid. 609(a). Under these principles, the prior felony convictions of Rick Ross and
8 Fawn Foster, disclosed by the State and addressed in the Defense’s opening motion, should be
9 admitted into evidence.

10 In addition, Mr. Ray is entitled to introduce convictions the State did *not* disclose despite
11 explicit request: Ms. Foster’s prior misdemeanor convictions for crimes of dishonesty or false
12 statement. The Defense discovered these convictions this week while attempting to confirm Ms.
13 Foster’s probation information—information which the State had *also* refused to disclose and
14 ultimately revealed only through its just-filed Response. The prosecution possesses all of this
15 relevant, admissible and exculpatory information. Mr. Ray must continually press to discover it.
16 The Constitution safeguards the defendant’s right to a fair trial and to the full and complete cross-
17 examination of the State’s witnesses. Consistent with that constitutional protection, the
18 impeachment evidence should be admitted.

19 **II. ARGUMENT**

20 **A. Rick Ross**

21 Mr. Ray’s Sixth Amendment right to a full and complete cross-examination of Rick Ross,
22 whom the State has designated as an *expert* witness, calls for the admission of Ross’s felony
23 conviction for conspiracy to commit grand theft. *See* Defense Motion at 1; Defendant’s Response
24 to the State’s Motion *in Limine* No. 9 re: Rick Ross at 1–2. Although the conviction is not recent,
25 it bears on Mr. Ross’s qualifications and credibility as an expert on a critical issue in this trial. It
26 therefore falls within Mr. Ray’s fundamental right to confrontation. *See generally State v.*
27 *Correll*, 148 Ariz. 468, 473 (Ariz. 1986) (“The right of confrontation, which includes the right to
28 cross-examine witnesses, is a fundamental right.”) (citing and quoting *Pointer v. Texas*, 380 U.S.

13122463.2

1 400, 403-04 (1965)). "Trial courts must give great latitude for full and complete cross-
2 examination of expert witnesses," and must not permit a party to "present a one-sided version" of
3 an expert's "qualifications and expertise." *Gasiorowski v. Hose*, 182 Ariz. 376, 381, 382 (App.
4 1995).

5 The State contends these fundamental Constitutional rights should be ignored because the
6 interests of justice are not served by granting Mr. Ray full and complete cross-examination of an
7 expert witness. *See* State's MIL Re: Rick Ross, filed 1/24/11, at 3. The State cites no relevant
8 case law for this proposition. The one case cited by the State relates to a defendant's due process
9 and other claims and simply does not consider this issue. Nor does the State present any
10 competent evidence that Mr. Ross has undergone "extraordinary rehabilitation." *Id.* Indeed, Mr.
11 Ross' "deprogramming" activities demonstrate the opposite. In 1995, a federal district court
12 judge upheld a \$2.5 million punitive damages award against Ross for civil rights violations
13 related to the abduction and forcible deprogramming of an 18-year-old man, noting that Ross
14 "actively participated in the plan to abduct Mr. Scott, restrain him with handcuffs and duct tape,
15 and hold him involuntarily while demeaning his religious beliefs," and that "[a] large award of
16 punitive damages [was] also necessary" for "recidivism and mitigation" purposes, since "Mr.
17 Ross himself testified that he had acted similarly in the past and would continue to conduct
18 'deprogrammings' in the future." *See* Order, *Scott v. Ross*, Case No. C94-0079C, at 13 (W.D.
19 Wash. Nov. 29, 1995); *see id.* at 14 (noting the "seeming incapability" of Ross and his
20 codefendants to "appreciat[e] the maliciousness of their conduct").

21 This Court should allow Mr. Ross's felony conviction to be admitted in evidence for
22 purposes of impeachment.

23 **B. Fawn Foster**

24 **1. Misdemeanor convictions for crimes of dishonesty**

25 On May 3, 2010, the Defense requested from the State "[a] list of the prior felony
26 convictions *and misdemeanor conduct constituting moral turpitude* of witnesses whom the
27 prosecutor intends to call at trial. Rule 15.1(d)." Letter from Truc Do to Bill Hughes, 5/3/2010,
28 attached as Exhibit A. On July 16, 2010, the State disclosed the four (4) felony convictions of

13122463.2

1 Fawn Foster addressed in the Defense's opening motion and the State's Response. Letter from
2 Sheila Polk to Truc Do, 7/16/2010, attached as Exhibit B. The State did not disclose any
3 misdemeanor convictions.

4 Subsequently, in preparing to assess the admissibility of Ms. Foster's convictions at trial,
5 the Defense requested "[a]ll updates on the felony convictions of the State's witnesses, including
6 **any probation information** for Fawn Foster." Letter from Truc Do to Sheila Polk, 1/9/11,
7 attached as Exhibit C. The State did not disclose the probation information and instead asked the
8 Defense to supply legal authority for the request. Letter from Sheila Polk to Truc Do, 1/20/11,
9 attached as Exhibit D.

10 This week, on February 14, the State revealed some of Ms. Foster's probation information
11 in its Response. The State explained, *inter alia*, that Ms. Foster's two February 2006 convictions
12 for personal possession drug offenses were subject to the mandatory probation terms of §A.R.S.
13 13-901.01 and thus not admissible impeachment evidence under *State ex rel. Romley v. Martin*,
14 205 Ariz. 279 (2003). This information would have been valuable to the Defense in preparing its
15 motion to admit the February 2006 convictions into evidence.

16 In attempting to confirm the newly disclosed probation information, the Defense
17 discovered that Ms. Foster has been convicted at least twice within the past 10 years of
18 misdemeanor crimes involving dishonesty and false statement. These crimes are admissible
19 impeachment evidence under Rule 609(a), which permits impeachment with crimes that
20 "involved dishonesty or false statement, regardless of the punishment." The Defense will
21 independently obtain certified records for each conviction.

22 2. Felony convictions

23 The State agrees that Ms. Foster's November 2006 conviction for possession of drug
24 paraphernalia is admissible impeachment evidence. Response at 5. To the extent Ms. Foster
25 complied with the requirements of A.R.S. §13-901.01, the Defense could conceivably withdraw
26 its request to admit those convictions into evidence—and would have done so weeks ago had the
27 State disclosed the requested information.

1 The remaining question for this Court regarding Ms. Foster's felony convictions is her
2 1997 conviction for aggravated DUI. Although more than 10 years old, this conviction is
3 probative of Ms. Foster's credibility and should be admitted. As the State points out, the factors
4 affecting whether a prior conviction can be used for impeachment purposes include "subsequent
5 conduct and intervening circumstances." Response at 4 (quoting *State v. Henderson*, 116 Ariz.
6 310, 316 (1977)). Here, the subsequent conduct—a lengthy trail of lawbreaking spanning 13
7 years and numerous felony and misdemeanor convictions¹—weighs in favor of admitting the
8 1997 conviction. Mr. Ray must be able to fully reveal Ms. Foster's criminal behavior and its
9 relationship to her capacity for truth-telling.²

10 III. CONCLUSION

11 Mr. Ray's constitutional right of confrontation entitles him to full and complete cross-
12 examination regarding the criminal convictions of the prosecution's witnesses. Mr. Ray's
13 proposed use of impeachment evidence is entirely consistent with the prescriptions of Rule 609(a)
14 and (b). This Court should admit the convictions of Rick Ross and Fawn Foster into evidence.
15
16

17 ¹ To the best of the Defense's current knowledge, Ms. Foster's criminal history includes the following:

- 18 • July 1997: Convicted of Aggravated DUI, Yavapai County Superior Court.
- 19 • December 2002: Pled guilty in Cottonwood Municipal Court to (1) Marijuana -- Possession and
20 Use; (2) False Reporting to Law Enforcement; (3) Driving with License Suspended for Failure to
21 Pay or Failure to Appear; and (4) Failure to Produce Evidence of Financial Responsibility. In
22 connection with this matter, arrests warrants for Ms. Foster were apparently issued in June, July
23 and December of 2003, February of 2005, May of 2006, and on January 17, 2007.
- 24 • March 2005: Convicted of False Report to Law Enforcement Agency, Yavapai County Superior
25 Court.
- 26 • November 2005: Pled guilty in Camp Verde Municipal Court to driving with license suspended or
27 revoked for DUI. Additional charge for false reporting to law enforcement was dismissed.
- 28 • February 2006: Convicted of Possession of Marijuana and Possession of Drug Paraphernalia,
Yavapai County Superior Court.
- November 2006: Convicted of Possession of Drug Paraphernalia, Yavapai County Superior Court.

26 ² It is difficult to understand the State's complaint that it is prejudiced by the Defense's failure to provide
27 earlier notice of its intent to introduce Ms. Foster's 1997 conviction. This information was disclosed to the
28 *Defense, by the State* in July of last year. As Rule 609(b) requires, the Defense provided the State with
"sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair
opportunity to contest the use of such evidence." Ariz. R. Evid. 609(b).

1 DATED: February ^{17th} 2011

MUNGER, TOLLES & OLSON LLP

BRAD D. BRIAN

LUIS LI

TRUC T. DO

MIRIAM L. SEIFTER

THOMAS K. KELLY

By: 

Attorneys for Defendant James Arthur Ray

9
10 Copy of the foregoing delivered this ^{18th} day
11 of February, 2011, to:

12 Sheila Polk

13 Yavapai County Attorney

14 Prescott, Arizona 86301

by 

Bill Hughes
May 3, 2010
Page 2

4. Copies of all electronic surveillance of any conversations to which the Mr. Ray was a party, including without limitations jailhouse monitored conversations. Rule 15.1(9). The State indicated it did not know whether there existed any electronic surveillance in its First Supplemental Disclosure on March 4, 2010. However, reports provided by the State indicate that the Yavapai County Sheriff's Office, with the permission and knowledge of the State, monitored and recorded Mr. Ray's conversations as soon as he was first incarcerated on February 3, 2010.

5. A list of the prior felony convictions and misdemeanor conduct constituting moral turpitude of witnesses whom the prosecutor intends to call at trial. Rule 15.1(d). The State has named 112 civilian witnesses, not including medical personnel who treated participants, as trial witnesses in its disclosure to date. Unless the State narrows its list of witnesses to those it truly intends to call at trial, we are requesting this information for each of the 112 witnesses.

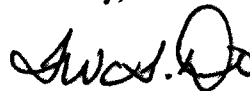
6. Finally, we are requesting personal interviews of the following witnesses designated for trial by the State. Please immediately advise us if the witness will not cooperate in granting a personal interview and/or whether the State prefers that the defense contact witnesses directly.

- Dr. Robert Lyon, Yavapai Medical Examiner
- Dr. Mark Fischione, Yavapai Medical Examiner
- Dr. A.L. Mosley, Coconino Medical Examiner
- Dawn R. Sy, Criminalist with Arizona Dept. of Public Safety
- Mike Rauton, Verde Valley Fire Captain

Can we agree to 2 consecutive days in May, for us to personally interview these witnesses and inspect the evidence?

Please let us know if you have any questions and thanks in advance for your professional courtesy and cooperation.

Sincerely,



Truc T. Do

cc Thomas K. Kelly, Esq.



Yavapai County Attorney

255 East Gurley Street
Prescott, AZ 86301
(928) 771-3344 (Criminal)
(928) 771-3338 (Civil)
Facsimile (928) 771-3110

SHEILA POLK
Yavapai County Attorney

VIA EMAIL & US MAIL

July 16, 2010

Truc T. Do
Munger, Tolles & Olson L.L.P.
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Re: State v. James Arthur Ray, CR 201080049

Dear Ms. Do:

In response to your request for information relating to prior felony convictions of the State's witnesses, the State has currently run criminal history reports on fifty-four (54) of the State's witnesses. We did not run reports on law enforcement or medical personnel, nor were we able to run reports on witnesses who reside outside of the United States. In some cases, we lacked sufficient identifying information to run criminal history reports. To date only one witness has been identified as having prior felony convictions. Specific details are as follows:

Witness: Fawn Lee Foster

Prior Felony Convictions:

On July 14, 1997, Fawn Lee Foster was convicted of Aggravated Driving Under the Influence, a class 4 felony, in Yavapai County Superior Court Cause No. CR9970176, date of offense was June 1, 1997.

On February 8, 2006, Fawn Lee Foster was convicted of Possession of Marijuana, a class 6 felony, and Possession of Drug Paraphernalia, a class 6 felony, in Yavapai County Superior Court Cause No. CR820050156, date of offense was February 6, 2005.

On November 13, 2006, Fawn Lee Foster was convicted of Possession of Drug Paraphernalia, a class 6 felony, in Yavapai County Superior Court Cause No. CR820060728, date of offense was October 9, 2006.

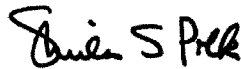
July 16, 2010

Letter to Truc Do re CCH of witnesses

Page Two

We will continue with our efforts to run criminal history reports on the remaining civilian witnesses and shall promptly disclose any additional information pursuant to Rule 15.1(d)(1).
Ariz. R. Crim. P.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sheila S Polk". The signature is written in a cursive, flowing style.

Sheila Sullivan Polk
Yavapai County Attorney

MUNGER, TOLLES & OLSON LLP

355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

January 9, 2011

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RONALD L. OLSON
RICHARD S. VOLPURT
DENNIS C. BROWN
ROBERT E. BENJAMIN
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YUAN MILLER
MARK R. GORDON
DANIEL R. WICKERT
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DAVID B. VAN
DAVID E. LINDHART
JENNY H. HONG
GUY A. RUB
AARON BELI LOWENSTEIN
DANIEL V. EUBANK
LAWA S. EUBANK
MELISSA GIMACHO-SILVER
SARALA V. NABALA
JUSTIN L. HENDERBY
LEO GOLDBERG
KIMBERLY A. HARRIS
MATTHEW A. MACDONALD
CAROLYN V. ZAROVSKI
ERIC S. HOFFER
BRIN E. SCHMANN
MARGARET S. BERNER
ESTHER H. BURG
RICHARD D. EISENBERG
ALAN M. B. STEIN
PETER A. GUFF
SUSAN E. BERN
TRUC T. BO
OF COURTES
E. LEROY THOMAS
BOB COON

VIA EMAIL

Sheila Polk
Yavapai County Attorney's Office
255 East Gurley Street
Prescott, Arizona 86301

Re: State v. James Arthur Ray

Dear Sheila:

I am writing regarding the State's 26th disclosure, which we received on January 7, 2011, and to request additional disclosure. As a first matter, we would like to interview Rick Ross, Douglas Sundling, Steve Pace, and Dr. Matthew Dickson as early as possible given the motion cut-off date of January 24, 2011. We are available January 13, 14 and the week of January 17 and would like to conduct each of these interviews in person.

Secondly, in your letter of January 7, 2011, you've indicated that the State has provided Rick Ross and Steve Pace with case materials to review and that both will testify to opinions and conclusions they have reached in reviewing those materials that are specific to the events in this case and to Mr. Ray. The reports of Mr. Ross and Mr. Pace provided to us in the 26th disclosure do not contain any such specific opinions or conclusions. Rather, their reports recite generic information in their respective subject matters.

We believe this disclosure is inconsistent with the Court's several rulings on expert disclosure. In particular, the Court recently ruled that:

"[T]he prosecutor must disclose the results of physical examinations and of scientific tests, experiments, or comparisons that have been completed, *regardless of whether or not these*

Sheila Polk

January 9, 2011

Page 2

results have been expressed in some form of written or recorded or other statement. Furthermore, ... the State's obligations under Rule 15.1(b)(4) applies to all experts, regardless of whether or not the State intends to call the expert at trial, and arises once the expert has examined the defendant or considered any evidence in the particular case."

Court's Minute Order of December 1, 2010 at pages 2-3. The Court again emphasized the State's obligations of full disclosure during our status conference last week. We request that the State supplement its expert disclosures to comply with its 15.1(b)(4) obligations, prior to defense interviews of these experts.

Additional Disclosure Requests

Please also provide the following materials at your earliest convenience:

1. Audio recording of the 10/08-10/09 interviews of Brandy Rainey-Amstel, Linnette Veguilla and Ami Grimes by Sgt. Williams, as noted in his supplemental report, Bates 000010.
2. Audio recording of the 6/10/10 interview of Michael Barber, transcribed at Bates 5390-5421.
3. Audio recording of the 10/23/09 interview of Lynette Wachterhauser.
4. All updates on the felony convictions of the State's witnesses, including any probation information for Fawn Foster.

We anticipate receiving Dr. Ian Paul's report tomorrow and will promptly disclose the same to you. If you have any questions, please feel free to contact me. Thank you in advance for your professional courtesy and cooperation.

Sincerely,

//Truc T. Do

Truc T. Do



Yavapai County Attorney

255 East Gurley Street
Prescott, AZ 86301
(928) 771-3344 (Criminal)
(928) 771-3338 (Civil)
Facsimile (928) 771-3110

SHEILA POLK
Yavapai County Attorney

January 20, 2011

VIA EMAIL & US MAIL

Truc T. Do
Munger, Tolles & Olson L.L.P.
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Re: State v. James Arthur Ray, CR 201080049
Your letter dated January 9, 2011

Dear Ms. Do:

In your letter dated January 9, 2011, you requested additional disclosure. The status of your specific requests is addressed below:

Audio Recording of the 10/08-10/09 interviews of Brandy Rainey-Amstel, Linnette Vequlla and Ami Grimes

These recordings were on a micro cassette and were placed into evidence as Evidence Item 1. Upon receipt of your request they were copied onto a CD and disclosed in the State's 28th Supplemental Disclosure on January 14, 2011. In responding to your request, we also determined that Evidence Item 2, the audio taped statement of Melissa Phillips by Deputy Tieman at Verde Valley Medical Center, and Evidence Item 3, the audio taped statements of Linda Andresano and Dennis Mehravar by Deputy Brazell at Verde Valley Medical Center, had not been disclosed. Copies of these items were also included in the State's 28th Supplemental Disclosure. We have verified that the interviews recorded on Evidence Item 4 were previously converted to DSS files and disclosed.

Audio recording of the 6/10/10 interview of Michael Barber (Transcript previously disclosed at Bates 5390-5421)

The audio recording of the 6/10/10 interview of Michael Barber was disclosed in the State's 27th Supplemental Disclosure on January 13, 2011.

Audio recording of the 10/23/09 interview of Lynette Wachterhauser

Detective Diskin checked with VIP Gordon-Lorentze who conducted the interview. Apparently, there was a problem with the recorder and the interview was not successfully recorded.

Updated criminal history information on the State's witnesses, including any probation information for Fawn Foster

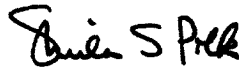
We will timely update criminal history information on the State's witnesses as is necessary. Please provide me with your authority for requesting probation information on Fawn Foster.

State's request for disclosure of transcripts

It is evident that you have had transcripts made of many of the witness interviews. I would appreciate receiving copies of all the transcripts you have made. Thank you in advance for your professional courtesy in this regard.

If you have any questions relating to the above, you may contact my paralegal, Kathy Durrer, via e-mail at kathy.durrer@co.yavapai.az.us.

Very truly yours,



Sheila Sullivan Polk
Yavapai County Attorney